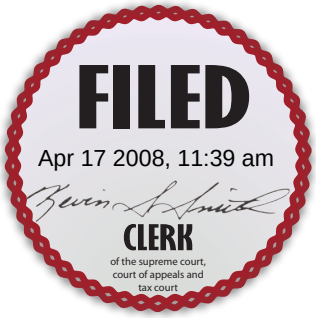

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IN THE COURT OF APPEALS OF INDIANA

LYNN A. McNULTY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0707-CR-602
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Judge
Cause No. 49G22-0703-FC-49281

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Lynn A. McNulty pled guilty to forgery[1] as a Class C felony and was sentenced to eight years incarceration. She appeals, raising the following restated issues:

I. Whether the trial court abused its discretion in failing to recognize her mental illness as a mitigating circumstance; and

II. Whether her sentence was inappropriate in light of the nature of the offense and her character.

We affirm.

FACTS AND PROCEDURAL HISTORY

McNulty pled guilty to one count of forgery as a Class C felony for uttering a fraudulent check in the amount of $239.56 to obtain merchandise and cash from a Kroger grocery. Pursuant to a plea agreement, the State dismissed two additional forgery counts and a theft count and dismissed charges in three additional pending cases. At the sentencing hearing, the trial court found McNulty's extensive history for theft and forgery as an aggravating circumstance. It also found the hardship incarceration would have on McNulty's dependent mother as a mitigating circumstance. After finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced McNulty to eight years incarceration. She now appeals.

DISCUSSION AND DECISION

I. Abuse of Discretion

McNulty argues that the trial court erred by failing to acknowledge her mental illness as a mitigating circumstance. McNulty notes that she suffers from depression,

[1] *See* IC 35-43-5-2.

which has been treated with medication, and has been hospitalized for her depression two different times. At the sentencing hearing, McNulty argued that she commits crimes, like the instant offense, when she fails to stay medicated for her depression. *Tr.* at 22-23.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). If the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id*. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances and the reasonable inferences drawn therefrom. *Id*.

Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Id.* This statement must include "a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence," and "[i]f the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id.* The trial court's assignment of relative weight or value "to reasons properly found or those which should have been found is not subject to review for abuse." *Id*. at 491.

When a defendant alleges that the trial court failed to identify a mitigating circumstance, she is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999). The trial court is not obligated to find the existence of mitigating factors. *Id*. "If the trial

court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993) (citing *Hammons v. State*, 493 N.E.2d 1250, 1254 (Ind. 1986)).

Here, during the sentencing hearing, when asked why she continues to commit these crimes, McNulty offered the brief explanation of not being properly medicated for depression at the time the crimes were committed. McNulty admitted the reason she was not medicated at those times was due to her own personal failure to take her prescribed medication. We acknowledge the fact that she has had a history of depression. However, given the fact that McNulty voluntarily chose not to take her medication, we do not believe that the trial court abused its discretion in not finding McNulty's mental illness as a mitigating circumstance.

II. Inappropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). "Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate." *McMahon v. State*, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

McNulty asserts that her sentence of eight years was inappropriate in light of the nature of the offense and her character. In addressing her maximum sentence of eight years, McNulty argues that "[t]he maximum sentence should be reserved for the worst offenses and the worst offenders." *Appellant's Br.* at 4. (citing *Bacher v. State*, 686 N.E.2d 791, 802 (Ind. 1997)). She argues that her crime of forging a check for $239.56 "causes relatively little harm" when compared to other Class C felony crimes such as Involuntary Manslaughter, Reckless Homicide, Child Molesting, or Causing Death When Operating a Motor Vehicle. *Id.* As a corollary to this argument, she suggests that her sentence violates the Indiana Constitution[2] in not being proportional to the nature of the offense. McNulty recognizes that she has been convicted for at least nine prior felonies, but she argues that these crimes, as well as the crime at hand, did not involve violence and caused no physical harm to others.

As to the nature of the offense, we agree with McNulty that her crime did not cause physical harm to others, and under normal circumstances, a $239.56 forged check is not a particularly egregious crime. Turning to her character, however, McNulty has nine prior felony convictions for crimes similar in substance to the forgery to which she pled guilty in this case, including forgery, fraud on a financial institution, theft, and check fraud. At the time she committed the offense at hand, McNulty also had pending forgery charges in Johnson County. In efforts to rehabilitate McNulty, the courts have tried prison, probation, work release, and home detention. McNulty has violated these efforts

[2] Ind. Const. art. I, § 16 ("All penalties shall be proportioned to the nature of the offense.").

and continued to re-offend. Finally, we note that she could have received a longer sentence as a habitual offender. McNulty's sentence was not inappropriate.

Affirmed.

RILEY, J., and MAY, J., concur.